



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

November 9, 2012

*Via Hand-Delivery and Electronic Mail*

Tom Luna  
Superintendent of Public Instruction  
State Department of Education  
650 W. State Street, Room 200  
Boise, ID 83701  
[trluna@sde.idaho.gov](mailto:trluna@sde.idaho.gov)

Re: Request for Opinion - Proposition 2 (Pay for Performance)

Dear Superintendent Luna:

This letter is in response to your request of October 31, 2012, for a written legal opinion from this office on the following question:

*If Proposition 2 is repealed, will local school districts and public charter schools have the legal authority to distribute pay-for-performance bonuses to individual teachers after the November 21 certification of the election?*

**The Effective Date of the Repeal is the Date of the Governor's Proclamation Under Idaho Code § 34-1813**

Proposition 2 was a referendum on S. 1110 from the 2011 legislation session, which created a new section of Idaho Code establishing teacher and/or administrator bonuses based on performance, hard to fill positions, and leadership awards. S.B. 1110, § 1; Idaho Code § 33-1004I. Pursuant to Idaho Code § 34-1813, referendum results are effective upon the canvassing of votes and the issuance of the Governor's proclamation, which is tentatively scheduled to occur on November 21, 2012. This proclamation date will be the effective date for the repeal of those matters addressed in S. 1110.

The distribution of Pay for Performance funds from the SDE to school districts is statutorily required to occur no later than November 15.<sup>1</sup> Idaho Code §§ 33-1004I(6) and 33-1009; S.B. 1110, Section 1. Significantly, Idaho Code §33-1004I(2)(c)(iv) provides that “[p]ay for performance bonuses shall be paid by school districts to qualifying certificated employees in a lump sum by no later than December 15 following the spring test of the prior school year.” Idaho Code § 33-1004I(2); S.B. 1110, Section 1. Therefore, your request essentially asks whether school districts that have not completed payment of Pay for Performance bonuses to their eligible certificated staff by November 21, 2012, would have until December 15, 2012, to complete all bonus payments. Alternatively, the question could be posed as to whether such school districts would be precluded from making any bonus payments after November 21, 2012.

### **School Districts Should Complete Bonus Payments**

While the Idaho Supreme Court has never directly ruled on the issue set forth in your inquiry, Idaho laws are not to be applied retroactively unless the law contains a clearly expressed intent of retroactive application.<sup>2</sup> With regard to Proposition 2, there is nothing in its language expressing an intent that repeal be applied retroactively. Furthermore, the operative events that gave rise to teachers or administrators qualifying for Pay for Performance bonuses all occurred during the 2011-2012 school year.<sup>3</sup> The events that have occurred this fiscal year on or before December 15, 2012, are merely

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<sup>1</sup> This opinion presupposes that the State Department of Education (“SDE”) will distribute the Pay for Performance funds appropriated by the 2012 session of the Legislature to school districts by November 15, 2012.

<sup>2</sup> Idaho Code § 73-101 (“No part of these compiled laws is retroactive, unless expressly so declared”); see also *Woodland Furniture, LLC v. Larsen*, 142 Idaho 140, 145 (2005) (“unless a contrary intention is clearly indicated, a new statute will not be given retrospective effect.”). The U.S. Supreme Court has also long held that “[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative” that a retroactive application is required. *United States v. Heth*, 7 U.S. 399, 413 (1806) (Paterson, J.) (the Court “refused to apply a federal statute reducing the commissions of customs collectors to commissions commenced before the statute’s enactment because the statute lacked ‘clear, strong, and imperative’ language requiring retroactive application”). The U.S. Supreme Court has further held that whether a law is applied retroactively or prospectively depends on whether or not the law applies to operative events that preceded the law’s effective date. *Landgraf v. USI Film Product*, 511 U.S. 244, 270 (1994) (“the court must ask whether the new provision attaches new legal consequences to events completed before its enactment”).

<sup>3</sup> The operative events occurring during the 2011-2012 school year include the work performed by teachers or administrators and the relevant student test scores.

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ministerial (non-discretionary) acts, including: collecting data attributable to the 2011-2012 school year to verify eligibility and calculate the actual bonus amount earned; distribution of Pay for Performance funds to school districts; and lump sum payouts by school districts of earned bonuses to qualified recipients.

Although this office cannot provide an answer free from any uncertainty, the most legally defensible conclusion is that the repeal of S. 1110 applies prospectively and that school districts would have through December 15, 2012, to complete payment of Pay for Performance bonuses to eligible certificated staff.

Based upon this analysis, there does not appear to be any legal impediment to school districts fulfilling their ministerial duty to make and complete the Pay for Performance distributions. It is recommended that this ministerial responsibility be completed as efficiently as practical. Individual school districts may need to discuss specific situations with their respective school district attorneys—those situations should be addressed between the school district and the individual(s) involved.

I hope that you find this analysis helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew J. Snook". The signature is fluid and cursive, with the first name "Andrew" and last name "Snook" clearly distinguishable.

ANDREW J. SNOOK  
Deputy Attorney General

AJS/lg